IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1543

MISSOURI PACIFIC RAILROAD COMPANY, ET AL,
Petitioners,

versus

MR. & MRS. N. H. WHITE AND
MRS. DOROTHY MAE GILES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 6, 1976.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court, printed in Appendix B hereto, *infra*, Page 7a, is reported in 392 F. Supp. 1120 (W.D. La. 1975). The order

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1 Missouri Pacific Railroad Company and The Texas & Pacific Railway Company, hereinafter referred to as the "Railroads".

of the Circuit Court of Appeals granting the Railroads leave to appeal from the interlocutory decree of the District Court, pursuant to 28 U.S.C. Section 1292(b), is printed in Appendix B hereto, *infra*, Page 20a. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, Page 21a, is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 6, 1976, Appendix B, Page 23a, *infra*. Rehearing was denied on March 11, 1976, Appendix B, Page 24a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether this action should be dismissed upon appropriate motions filed by Applicants where there has been no valid service of process upon any Defendant in the case, the District Court admittedly had no jurisdiction and the action is tolled by running of the Statute of Limitations.

STATUTES INVOLVED

The statutory provisions involved are Rule 4(d)(3), Rule 8(a) and Rule 10(a) of the Federal Rules of Civil Procedure; Article 1261 of the Louisiana Code of Civil Procedure; Articles 2103, 2203, 2315, 3519 and 3536 of the Louisiana Civil Code; and Louisiana Statutes Annotated R.S. 9:5801 and R.S. 13:3473. They are printed in Appendix A, *infra*, Pages 1a-6a.

STATEMENT

A tort action for damages for wrongful death was filed on September 27, 1974, the last day of the year following an accident which occurred on September 27, 1973, when Henry C. Rodney, Jr. and Joann W. Rodney were killed when their automobile collided with Applicants' train at the Woolworth Road crossing in Caddo Parish, Louisiana. Respondents, citizens of Louisiana, as parents of Joann W. Rodney and for the benefit of the children of Henry C. Rodney, Jr., named as Defendants the Railroads, Petitioners herein, and also the Caddo Parish Police Jury, the latter being a citizen of Louisiana.[2] The jurisdiction of the District Court was apparently invoked under the diversity statutes although the complaint contains no allegations of diversity of citizenship and no allegations that the amount involved exceeds $10,000.00 exclusive of interest and costs. The complaint contains no allegations of money damages. In Article 17 of the complaint it is alleged that the Plaintiffs reserve the right to amend the complaint within the time allowed by the Federal Rules of Civil Procedure by specifying the amount of damages sustained by each Plaintiff. No such amendment has ever been filed. Respondents prayed for service of process upon the Railroads through the Secretary of State of Louisiana, despite the fact that the Railroads have registered agents for service of process in Louisiana.

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2 For purposes of diversity jurisdiction, a police jury is considered a citizen of the state in which it is located. *National Liberty Insurance Company of America v. Police Jury of Natchitoches Parish*, 96 F.2d 261 (5th Cir., 1938); *Pearl River County, Miss. v. Wyatt Lumber Co.*, 270 F. 26 (5th Cir., 1921); *Moss v. Calumet Paving Co.*, (S.D. Ind., 1962) 201 F. Supp. 426; and *State ex rel. Porterie v. Smith*, 162 So. 413, 182 La. 662.

On October 2, 1974, service of process on the Railroads was attempted through the Secretary of State of Louisiana. On October 7, 1974 service of process was made on the Caddo Parish Police Jury. On October 10, 1974, the District Court entered an order directing that service of process upon the Caddo Parish Police Jury be quashed.

On October 21, 1974, the Railroads, your Petitioners, filed motions to dismiss the action for lack of service of process, for lack of jurisdiction over the subject matter, and for lack of diversity of citizenship. These motions came up for hearing in the District Court on February 21, 1975 and at that time Respondents, the Plaintiffs, filed a notice of dismissal of the action as to the Caddo Parish Police Jury only, pursuant to Federal Rules of Civil Procedure 41(a). The Railroad then filed motions to dismiss the complaint for failure to state a claim upon which relief can be granted, plea of prescription or running of the Statute of Limitations and/or for summary judgment.

On March 31, 1975, the District Court entered a memorandum ruling wherein it recognized that complete diversity is lacking, no valid service of process was had upon any Defendant, and the Statute of Limitations had run because no Defendant was served with citation within one (1) year from the date of the accident.[3] However, it held that the Court had the power to preserve and perfect its diversity jurisdiction over the case by dropping the non-diverse party, the Caddo Parish Police Jury, as a Defendant. The District Court instructed counsel for Respondents to proceed to perfect service of process on the Defendants. To the present date, counsel for Respondents has not proceeded to perfect service of process and there has never been valid service of process upon any Defendant in this action. No process has been served upon Applicants or upon Applicants' agents for service of process in Louisiana nor have copies of the summons and complaint been mailed to Applicants. Applicants insisted in the District Court below and in the Circuit Court of Appeals that they are entitled to the basis right of legal service of process before any further proceedings in this case. They continue to urge their basic rights and show that their motion to dismiss this action for lack of service of process should be granted and the purported service of process upon them through the Secretary of State of Louisiana, should be quashed.

3 392 F. Supp. 1120, Appendix B, Page 9a, *infra*.

Rule 4(d)(3) of the Federal Rules of Civil Procedure[4] provides that service of process upon a foreign corporation shall be made by delivering a copy of the summons and of the complaint to the agent authorized by appointment to receive service of process. Article 1261 of the Louisiana Code of Civil Procedure[5] provides that a foreign corporation shall be served with citation through its agent for service of process. The Railroads have appointed agents for service of process in the State of Louisiana, whose names are published in a book prepared by the Secretary of State of Louisiana entitled "Agents of Foreign Corporations".[6] The book showing the names of the

4 Appendix A, Page 1a, *infra*.

5 Appendix A, Page 2a, *infra*.

6 Louisiana Statutes Annotated R.S. 13:3473, Appendix A, Page 5a, *infra*, requires the Secretary of State to publish this list annually.

Railroad's registered agents for service of process in Louisiana is filed in the record of the case attached to the Railroads' motion to dismiss for lack of service of process.

In *Stanga v. McCormick Shipping Corporation*, (5 Cir., 1959) 268 F.2d 544, the Circuit Court of Appeals below held that, under Louisiana law, service of process must be made upon the Defendant's registered agent where a foreign corporation has appointed an agent for service of process. In the case of *Majesty v. Comet-Mercury Ford Company of Lorain, Michigan*, (1974) 296 So.2d 271, the Louisiana Supreme Court held that service of process on a foreign corporation through the Secretary of State of Louisiana was invalid where the foreign corporation had appointed agents for service of process which were published in the book entitled "Agents of Foreign Corporations" published by the Secretary of State of Louisiana. The Louisiana Supreme Court quashed the purported service of process upon the Defendant through the Secretary of State of Louisiana.

In view of the fact that the Railroads have appointed agents for service of process in Louisiana, service of process upon them through the Secretary of State of Louisiana is invalid. The Secretary of State of Louisiana is not their agent for service. Moreover, it is well settled that service upon a Defendant through the Secretary of State without any additional notice to the Defendant by mail would deprive the Defendant of due process of law. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565; *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; *International Shoe Company v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; and

McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223. In this action, the purported service of process upon the Railroads through the Secretary of State of Louisiana should be quashed, Applicants' motion to dismiss for lack of service of process should be granted and the action dismissed.[7] No appearance has been made in the case by the Railroads and they cannot run the risk of waiving their basic right to service of process by appearing to defend themselves in this action.

In its memorandum ruling of March 31, 1975,[8] the District Court below admitted that it lacked diversity jurisdiction and held:

> "Soon after the filing of these suits, counsel for the Railroads interposed a motion to dismiss for lack of jurisdiction over the subject matter as there was not complete diversity of citizenship between Plaintiffs and Defendants in either case, as required by *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806). A review of the parties to this litigation quickly reveals that Defendant, Caddo Parish Police Jury, is domiciled in the same state as Plaintiffs, therefore, complete diversity is lacking in both suits."[9]

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7 In *Conner v. Continental Southern Lines, Inc.*, (1974) 294 So.2d 485, The Louisiana Supreme Court held that service of process directed to a corporate defendant and made on one other than the person authorized to accept such service is illegal and without effect.

8 392 F. Supp. 1120, 1122; Appendix B, Page 10a, *infra*.

9 A companion case of *Freeman Brown and Carrie Brown v. Texas & Pacific Railway Co., Missouri Pacific Railroad Co. and Caddo Parish Policy Jury*, Civil Action No. 74-901, was settled and dismissed in the District Court.

There is no Federal question involved in this action. The jurisdiction of the District Court was invoked under the diversity statutes. On the face of the complaint, complete diversity is lacking because the Plaintiffs, Respondents, are citizens of the same state as the Caddo Parish Police Jury, one of the Defendants. By joining the Caddo Parish Police Jury as a Defendant, the Plaintiffs destroyed the diversity jurisdiction of the Court. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806); and *Mas v. Perry*, 489 F.2d 1396 (5 Cir., 1974).

In addition to the fact that the complaint on its face shows that complete diversity of citizenship is lacking between the Plaintiffs and the Defendants, there is no allegation in the complaint to the effect that the amount in controversy exceeds $10,000.00 exclusive of interest and costs. In Article 17 of the complaint, the Plaintiffs alleged that they reserved the right to amend the complaint to specify the amount of damages sustained by each Plaintiff. No such amendment has ever been filed. Rule 8(a)(1) of the Federal Rules of Civil Procedure[10] provides that the complaint shall contain "a short and plain statement of the grounds upon which the Court's jurisdiction depends." Respondents failed to set forth allegations of the requisite jurisdictional amount. From the face of the complaint, there is no diversity of citizenship between the Plaintiffs and all of the Defendants. The motion to dismiss this action for lack of diversity jurisdiction filed by the Railroads, Applicants herein, should be granted.

This action, filed under the provisions of the Louisiana Wrongful Death Statute, Article 2315 of the

10 Appendix A, Page 1a, *infra*.

Louisiana Civil Code,[11] has tolled by the running of the Louisiana Statute of Limitations of one (1) year. The Wrongful Death Statute itself sets forth a limitation of one (1) year within which to file an action for wrongful death. In addition, Louisiana has a one (1) year Statute of Limitations applicable to tort claims.[12] Louisiana Statutes Annotated R.S. 9:5801[13] provides that the Louisiana Statute of Limitations is interrupted by a suit filed in an incompetent court only as to "the Defendant served by the service of process" within the one (1) year period. The requirement of service of citation on the Defendant within the one (1) year period is an integral part of Louisiana Statute of Limitations. The complaint in this action was not filed in the District Court until September 27, 1974, the last day of the year following the date of the accident. In the memorandum opinion of March 31, 1975, the District Judge held as follows[14]:

> "In neither case was any Defendant served with the citation within one (1) year from the date of the accident."

To the present date, which is more than two and one-half (2½) years since the date of the accident sued upon, the Railroads have never been served with citation and process through their agents for service of process in Louisiana. The purported service of process upon them through the Secretary of State of Louisiana was invalid and was not made until October 2, 1974, after the Louisiana Statute of Limitations had run. The Railroads' motion to dismiss on the ground of

11 Appendix A, Page 3a, *infra*.
12 Article 3536 of Louisiana Civil Code, Appendix A, Page 5a, *infra*.
13 Appendix A, Page 5a, *infra*.
14 392 F. Supp. 1120, 1122, Appendix B, Page 9a, *infra*.

prescription or running of the Statute of Limitations should be granted.

Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), involved an accident which occurred in Kansas on October 1, 1943. Kansas had a two year Statute of Limitations applicable to tort claims which provided that an action should be deemed commenced as to each defendant at the date of service of the summons upon him. The original suit was filed on September 4, 1945, and summons issued to the defendants on September 7, 1945, but the service thereof was quashed. Service was not made on the defendants until December 28, 1945, after the Statute of Limitations had run. The Court of Appeal held that the requirement of the Kansas statute of *service of summons* within the two year period was an integral part of that state's Statute of Limitations. Accordingly, under *Guaranty Trust Company v. York*, 326 U.S. 99, 89 L.Ed. 2079, 65 S.Ct. 1464, since the plaintiff was barred from recovery in the State Court, he was likewise barred in the Federal Court. In affirming the judgment of the Court of Appeals, this Court held as follows:

> "It is conceded that if the present case were in a Kansas court it would be barred. The theory of *Guaranty Trust Co. v. York* would therefore seem to bar it in the federal court, as the Court of Appeals held. The force of that reasoning is sought to be avoided by the argument that the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts — a matter of procedure which the principle of *Erie R. Co. v. Tompkins*

does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.

That was the reasoning and result in *Bomar v. Keyes* (CCA2d NY) 162 F2d 136, 141. But that case was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See *Cities Serv. Oil Co. v. Dunlap*, 308 US 208, 84 L.Ed. 196, 60 S.Ct. 201; *Palmer v. Hoffman*, 318 US 109, 117, 87 L.Ed. 645, 651, 63 S.Ct. 477, 144 ALR 719. *It accrues and comes to an end when local law so declares. West v. American Teleph. & Teleg. Co.*, 311 US 223, 85 L.Ed. 139, 61 S.Ct. 179, 132 ALR 956; *Guaranty Trust Co. v. York*, 326 US 99, 89 L.Ed. 2079, 65 S.Ct. 1464, 160 ALR 1231, supra. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was

started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. *We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action.* We may not do that consistently with *Erie R. Co. v. Tompkins.*"
(Emphasis Supplied)

In Moore's Federal Practice, Vol. 3, pp. 1020 and 1021, Sec. 15.15(2), the following statements appear:

"In cases involving non-federal matters the federal court must apply whatever time period would be applicable to a like action, whether at law or in equity, in the courts of the state where the district court is held. And in *Ragan v. Merchants Transfer & Warehouse Co.*, the Court held that if the statute of limitations is geared to service of process then the mere commencement of an action in the federal court by filing a complaint does not toll the state statute. The Court also declared that a state cause of action 'accrues and comes to an end when local law so declares.' "

Louisiana law on the subject is clear. The filing of suit in a Federal District Court which lacks diversity jurisdiction does not suffice to interrupt the Louisiana one (1) year Statute of Limitations where no citation was served upon any defendant within the one year period.

In *Hazel v. Allstate Insurance Co.*, (La. App. 3 Cir., 1970) 240 So.2d 431, the court held as follows:

"This is an appeal from a judgment dismissing a tort suit on the basis of prescription. The alleged tort occurred on September 6, 1968, when plaintiffs' son was killed in an automobile accident when the automobile he was riding in overturned and burned on Federal Interstate Highway 10 in Jefferson Davis Parish.

Suit was originally filed by plaintiffs in the United States District Court for the Western District of Louisiana on September 4, 1969, and service of citation was not perfected until September 10, 1969. The instant suit was filed on December 22, 1969, under provisions of LSA C.C. Article 2315 in the 31st Judicial District Court for the Parish of Jefferson Davis.

Defendant filed an exception of prescription to the suit as filed in the state court on the grounds that the suit in the Federal District Court did not interrupt prescription because the Federal Court was without jurisdiction to try the suit; and the service of citation was not made on defendant until subsequent to the running of prescription. LSA C.C. Article 3536, being applicable, excluded their suit having been filed beyond the one year from the date of the accident without the period having been interrupted. Judgment was entered sustaining the exception as applicable to the

tort suit, but reserving plaintiffs' rights based on contract under the medical payments coverage.

Appellants beseech us to overlook a positive statement of the legislature, LSA R.S. 9:5801, and a number of recent cases: *Doucet v. Home Indemnity Company*, 188 So.2d 442 (La.App. 3rd Cir. 1966); *Venterella v. Pace*, 180 So.2d 240 (La.App. 4th Cir. 1965); *Sansone v. Louisiana Power & Light Co.*, 164 So.2d 151 (La.App. 1st Cir. 1964); *Conkling v. Louisiana Power & Light Co.*, 166 So.2d 68 (La.App. 4th Cir. 1964); *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La.App. 4th Cir. 1964); and *Hidalgo v. Dupuy*, 122 So.2d 639 (La.App. 1st Cir. 1960), which hold that prescription may be interrupted either by the timely filing of a suit in a court of competent jurisdiction, whether filed in a State or Federal court or *by the service of citation upon defendant within the prescriptive period* even though the suit is filed in a court of incompetent jurisdiction.

* * * *

Here the Federal District Court was not a court of competent jurisdiction. This issue was clearly decided in *Venterella v. Pace*, supra; *Sansone v. Louisiana Power & Light Co.*, supra; *Conkling v. Louisiana Power & Light Co.*, supra; *Knight v. Louisiana Power & Light Co.*, supra.

> Plaintiffs also urge us to disregard the letter of the law because of service of citation from the Federal District Court was not made for six days after the suit was filed. Plaintiffs state, 'clearly this was an excessive administrative delay beyond plaintiffs' control.' We find no merit to the contention that plaintiffs should not be charged with the delay in service. *The responsibilities of choosing the proper forum are upon the plaintiff.* Plaintiffs could have avoided this result by filing suit in the proper court. *Sansone v. Louisiana Power & Light Co.*, supra. The plea of prescription was properly sustained."
> (Emphasis Supplied)

Identical decisions were reached by Louisiana courts in cases involving similar facts, in the following cases:

Conner v. Continental Southern Lines, Inc., (La. S.Ct. 1974), 294 So.2d 485;

Sansone v. Louisiana Power & Light Co., (La. App. 1 Cir., 1964) 164 So.2d 151;

Conkling v. Louisiana Power & Light Co., (La. App. 4 Cir., 1964) 166 So.2d 68;

Knight v. Louisiana Power & Light Co., (La. App. 4 Cir., 1964) 160 So.2d 832;

Venterella v. Pace, (La. App. 4 Cir., 1965) 180 So.2d 240; and

Doucet v. Home Indemnity Company, (La. App. 3 Cir., 1966) 188 So.2d 442.

All of the above cases were decided under the provisions of LSA-R.S. 9:5801 providing that, when a judicial demand is filed in an incompetent court, prescription is only interrupted as to those defendants actually served by the service of process. In each of those cases the original judicial demand was filed in the Federal District Court, but there was not complete diversity of citizenship and the case was dismissed. In each of the cases no service of citation was made upon the defendants within the one year period. In each of the cases the Louisiana courts held that the plea of prescription should be sustained.

In *Venterella v. Pace*, (La. App. 4 Cir., 1965) 180 So.2d 240, the court held as follows:

> "Pretermitting the question of whether the defendant Pace was an indispensable party and could have been dismissed, the fact remains that he was a party to the action from the time it was filed until it was dismissed. *The plaintiffs' joining of the non-diverse defendant deprived the federal court of jurisdiction over the cause of action. Mansfield C. & L. Ry. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Kern v. Standard Oil Co.*, 228 F.2d 699 (8th Cir., 1956). In this respect, it makes no difference whether there is only one defendant as in the Conkling, Sansone, and Knight cases or whether there are five defendants, only one of which is non-diverse. Jurisdiction over the cause of action is lacking in both, and it is this fact which renders the federal district court not 'of competent jurisdiction.' "
> (Emphasis Supplied)

In each of the above Louisiana cases the plaintiffs' application for writs to the Louisiana Supreme Court were refused. Accordingly, it is clear that Louisiana Courts would hold, under identical facts presented in the present case, that the Respondents' action is barred by running of the Statute of Limitations because it was filed in a Federal Court which lacked diversity jurisdiction and because no citation was served on any defendant within the one year period.

The same result would apply if Respondents' original suit had been filed in a Louisiana State Court which was not a court of competent jurisdiction or was an improper venue. In *Foster v. Breaux* (1972) 263 La. 1112, 270 So.2d 526, the Louisiana Supreme Court held that, where the original suit was filed in Tangipahoa Parish which was an improper venue for the suit, prescription on the cause of action was not interrupted because no suit was filed in a court of competent jurisdiction within the one year period, no service of citation was made on the defendant within the one year period, and the claim had prescribed.

The Louisiana Supreme Court in *Martin v. Mud Supply Co.*, (1960) 239 La. 616, 119 So.2d 484, held as follows:

> "One of the well known rules relative to prescription is, that it becomes interrrupted when the party in favor of whom the time necessary to acquire it is running, *has been cited to appear before a court of justice*, on account of the right or claim to which the prescription would apply. This is called a 'legal interruption', and it matters not whether

> the suit has been brought before a court of competent jurisdiction or not. *** It is therefore necessary that the party should be cited; and it cannot be controverted, that any other means of knowledge of the proceedings instituted against him, brought home to the party against whom the prescription is sought to be legally interrupted, would not be sufficient to operate as a *legal interruption* in the true sense of the law."
> (Emphasis added by the Supreme Court)

The decision of this Court in *Ragan v. Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, and the foregoing decisions of the Louisiana courts in similar cases have been followed with approval by the Circuit Court of Appeals below and the District Court below in prior cases.

In *Anderson v. Phoenix of Hartford Insurance Co.*, (W.D. La., 1970) 320 F. Supp. 399, the court dismissed an action for damages for personal injuries sustained in an automobile accident which occurred in Lake Charles, Louisiana, where it appeared that the District Court for the Western District of Louisiana lacked diversity of citizenship because the plaintiff and one of the defendants were both citizens of Louisiana and it further appeared that no service of citation was made on any of the defendants within one year after the accident occurred. The Court held as follows:

> "Jurisdiction was predicated on diversity of citizenship. It appeared from the pleadings that one of the defendants, Papillion, was a citizen of the same state as plaintiff and was

> subsequently dismissed. While Papillion may not have been an indispensable party to the tort action, he was nevertheless a proper co-defendant if plaintiff chose to hold all of them liable as joint wrongdoers. The fact remains that Papillion was a party to the action from the time it was filed until he was dismissed. This Court lacked jurisdiction over the civil action because of plaintiff's joining of the non-diverse defendant, and it is this fact which renders the federal district court not 'of competent jurisdiction.' *Venterella v. Pace*, La. App., 180 So.2d 240, rehearing denied December 6, 1965, writs refused February 4, 1966. Having found this Court to be without jurisdiction, our attention is turned to the second issue concerning the tolling of the Statute of Limitations.

If this suit was on a right created by federal law, filing of the complaint, as called for by Rule 3, is sufficient, without more, to satisfy the Statute of Limitations. Despite Rule 3, however, in a suit on a State created right, plaintiff must, before the Statute of Limitations has run, do whatever he would be required to do in a similar suit in State Court. We think this holding is required by *Ragan v. Merchants Transfer and Warehouse Company*, 1949, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520. The holding there is that where jurisdiction is based upon diversity of citizenship, a federal court cannot give an action longer life than it would have had in the State Court. In our factual setting LSA-R.S. 9:5801 is con-

trolling. The second sentence of that Act states:

"* * * When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process. As amended Acts 1960, No. 31, Sec. 1.'

Having found this Court to be without jurisdiction, the quoted language controls. No defendant was served within one year, which is the applicable time limitation for this cause of action, and it follows that this suit must be dismissed since prescription is interrupted *only* by service of citation within the prescriptive period when suit has not been brought in a court of competent jurisdiction. *Conkling v. Louisiana Power & Light Company*, La. App. (4th Cir., 1964) 166 So.2d 68.

Motions to dismiss and/or for summary judgment are granted."

The foregoing decision by the District Court below, involving facts very similar to those presented in the present case, was affirmed by the Circuit Court of Appeals below on July 8, 1971, in its opinion in *Anderson v. Papillion*, 445 F.2d 841 (5 Cir.). The Circuit Court held as follows:

"In diversity cases, state statutes of limitation, not the Federal Rules of Civil Procedure, govern the determination of whether actions are brought timely.

'Pure diversity' must exist between plaintiff and all defendants at the time suit is filed to support federal jurisdiction. *Strawbridge v. Curtiss*, (1806), 3 Cranch 267, 2 L.Ed. 435. Since 'pure' diversity did not exist at the time suit was brought, between Anderson, a Texas citizen, and Papillion, also a Texas citizen, the district court had no jurisdiction, and therefore was (as held by the trial judge) an 'incompetent court' within the meaning of Louisiana Revised Statutes 9:5801 as the term is defined by the Louisiana courts. *Knight v. Louisiana Power & Light Co.*, La. App. 1964, 160 So.2d 832; *Conkling v. Louisiana Power & Light Co.*, La. App. 1964, 166 So.2d 68, and *Venterella v. Pace*, La. App. 1966, 180 So.2d 240.

Ragan v. Merchants Transfer and Warehouse Company, 1945, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, prohibits a federal court in a diversity case from giving a cause of action a longer life than it would have had in the state court, Rule 3, F.R.Civ.P., providing that a civil action is 'commenced by filing a complaint with the court' must yield to a state statute such as L.R.S. 9:5801, because a federal court cannot do more in a diversity case than the state court down the street can do. Anderson would fare no better of course if he had filed his action originally in an *incompetent state court*.

We think *Ragan*, then, controls this case. Conceding as we do, that it has its critics, it remains viable.

In the present case, the District Court below, in its memorandum ruling of March 31, 1975, held as follows[15]:

> "In a suit wherein the jurisdiction of the Federal District Court is based on diversity of citizenship, *plaintiff must, before the statute of Limitations has run, do whatever he would be required to do in a similar suit in State Court. Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949). In the *Ragan* case, the Supreme Court held that where jurisdiction is based upon diversity of citizenship, a *Federal Court cannot give an action longer life than it would have had in the State Court.*"
> (Emphasis Supplied)

There is no doubt in the present case that the Respondents, before the Statute of Limitations had run, did not do what they would be required to do in a similar suit in the State Court. No defendant was served with the citation within one year of the date of the accident. Louisiana courts would sustain a plea of prescription. Federal Courts cannot give this action longer life than it would have had in the State Court. Applicants' motion to dismiss on the ground of running of the Statute of Limitations should be granted.

The District Court below, in an effort to preserve and perfect its diversity jurisdiction over this case, permitted Respondents to file a Rule 41(a) motion dropping the non-diverse Defendant, the Caddo Parish

15 392 F. Supp. 1120, 1123; Appendix B, Page 12a, *infra*.

Police Jury, as a party to the case.[16] Although the Respondents have never filed an amended complaint, the District Court below held that the Rule 41(a) motion of Respondents dropping the non-diverse Defendant, the Caddo Parish Police Jury, was the equivalent of an amendment to the complaint and would relate back to the filing of the original complaint, thereby interrupting the running of the Statute of Limitations. This ruling is contrary to Louisiana law. In *Succession of Roux v. Guidry* (La. App. 4 Cir., 1966) 182 So.2d 109, the court held that an amendment to the complaint filed after one year in an action for wrongful death does not relate back to the date of the filing of the original complaint and said:

> "The case before the Court is clearly a *wrongful death action* and unquestionably is a cause of action belonging to the parties in whose favor the statute creates it. The statute requires that the possessor of the right exercise it within one year of the death. If the cause

16 By voluntarily dismissing their claims against the Caddo Parish Police Jury after running of the Statute of Limitations, the Respondents destroyed their cause of action against the Railroads. By voluntarily dismissing their claim after the original demand, Respondents waived any interruption of the Statute of Limitations, Art. 3519 of Louisiana Civil Code, Appendix A, Page 5a, *infra*; *Adams v. Aetna Casualty & Surety Company* (1968) 252 La. 798, 214 So.2d 148; and *Franklin v. Insurance Company of North America* (La. App. 3 Cir., 1973) 284 So.2d 158. Plaintiffs' voluntary release of one alleged joint tort feasor, Caddo Parish Police Jury, without any reservation of rights, effectively discharged the Railroads. Art. 2203 of Louisiana Civil Code, Appendix A, Page 3a, *infra*; *Hoffpauir v. Kansas City Southern Railroad Company*, (La. App. 3 Cir., 1969) 219 So.2d 29; *Reid v. Lowden* (1939) 192 La. 811, 189 So. 286; *Harvey v. Travelers Insurance Company* (La. App. 3 Cir., 1964) 163 So.2d 915; and *Andry v. Maryland Casualty Company* (E.D. La. 1965) 244 F. Supp. 143.

of action is not exercised within that year, by the filing of suit, it ceases to exist.

* * * *

Plaintiffs cite LSA-C.C.P. articles 1151 and 1153, dealing with the amending of petitions, and a number of cases in support of his position that their amended petition should relate back to the date of the original petition and thus save the action from extinction. Most of these deal with prescription and are inapplicable in view of our opinion that the one year time limitation involved here is one of peremption."

In *Anderson v. Phoenix of Hartford Insurance Company* (W.D. La. 1970) 320 F. Supp. 399, affirmed 445 F.2d 841, the District Court below held as follows:

"This, above all, is conclusive: This Court had no jurisdiction of the original action against either Papillion or Phoenix. The action against Phoenix is prescribed. *There is nothing for plaintiff to relate back to. Under any interpretation of Rule 15(c) a prerequisite is that the original action was timely filed and is presently viable.*'
(Emphasis Supplied)

A Federal District Court has the power to preserve and perfect its diversity jurisdiction over a case by dropping a non-diverse defendant which is not indispensable where the original complaint was timely filed, the defendants were properly notified of the action and the cause of action was not barred by running of the Statute of Limitations. On the other hand, where a Federal District Court is incompetent for lack of diversity jurisdiction, where no defendant has ever been legally served with process and where the action is barred by running of the Statute of Limitations, the Federal District Court cannot attempt to perfect its diversity jurisdiction or give the action longer life than it would have had in the State Court. An amendment *after* running of the Statute of Limitations, dropping a non-diverse party, will not relate back to the date of the original complaint in order to perfect the District Court's jurisdiction. *Ragan v. Merchants Transfer & Warehouse Company, supra*, prohibits a Federal Court in a diversity case from giving a cause of action a longer life than it would have had in the State Court.

The District Court below, in ruling on Applicants' motion for rehearing, recognized that its ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion. The Court stayed proceedings until such time as an appeal could be taken pursuant to Title 28 U.S.C. Section 1292(b).[17] The Circuit Court of Appeal below granted Applicants' motion to appeal from the interlocutory decree of the District Court. However, on that appeal the Circuit Court below affirmed the ruling of the District Court without permitting oral argument and without assigning written reasons.[18]

17 392 F. Supp. 1120, 1126; Appendix B, Pages 20a-21a, *infra*.

18 See the unreported decision of the Circuit Court of Appeals below, Appendix B, Pages 21a-22a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. Applicants have been deprived of their basic right to legal service of process. Admittedly, service of process upon the Railroads through the Secretary of State of Louisiana is illegal and without affect. No valid service of process has been made upon any Defendant in this case. Moreover, on the face of the complaint, the Courts below lacked diversity jurisdiction and there are no allegations of the required jurisdictional amount. No amendment has ever been filed by Respondents setting forth any monetary amount involved in this case. The action was not timely filed in a court of competent jurisdiction, no service of citation was had on any Defendant within the one year period of limitations, and the case is barred by running of the Louisiana Statute of Limitations.

2. The Court of Appeals has rendered a decision in this case in direct conflict with its decision in *Anderson v. Papillion*, (1971) 445 F.2d 841, involving identical facts. The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *Ragan v. Merchants Transfer & Warehouse Company*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), and *Guaranty Trust Company v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, (1945). In its decision in *Anderson v. Papillion*, (1971), *supra*, the Court below held as follows:

> "*Ragan v. Merchants Transfer & Warehouse Company*, 1945, 337 U.S. 530, 69 S.Ct. 1223, 93 L.Ed. 1520, prohibits a Federal Court in a diversity case from giving a cause of action a longer life than it would have had in a State Court.
>
> * * * *
>
> We think *Ragan*, then, controls this case. Conceding as we do, that it has its critics, it remains viable."

The Court below in this case has apparently yielded to the critics of *Ragan v. Merchants Transfer & Warehouse Company, supra*, and no longer considers the decision of this Court viable. Clearly, the question presented is of importance. A Federal Court, which lacks diversity jurisdiction on the face of the complaint, cannot perfect its diversity jurisdiction *after* running of the Statute of Limitations and without prior notice to any Defendant. A Federal Court in a diversity case cannot give a cause of action a longer life than it would have had in the State Court. If there is to be a change in pre-existing law and decisions, and, if Federal Courts are to be permitted to perfect diversity jurisdiction *after* running of the State Statute of Limitations and without notice to the Defendants, the principles expressed in *Erie Railroad Company v. Tompkins*, (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188; *Guaranty Trust Company v. York, supra;* and *Ragan v. Merchants Transfer & Warehouse Company, supra*, will be laid to rest. In diversity cases, actions will be given a longer life in the Federal Courts than they would have in the State Courts across the street. By

simply permitting the complainants to drop a non-diverse Defendant *after* running of the Statute of Limitations, Federal Courts will be permitted to create their diversity jurisdiction which was not apparent on the face of the complaint. Dockets of Federal Courts, which are already bursting at the seams, will be further crowded. There is a substantial difference of opinion on the matters presented in this case which should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. KING
Counsel for Petitioners

(April ____, 1976)

CERTIFICATE OF SERVICE

I CERTIFY that three (3) copies of the foregoing petition for a writ of certiorari have been served on each of the parties separately represented in this proceeding by depositing the same in a United States Post Office, with first class postage pre-paid, addressed to counsel of record at their Post Office addresses as follows:

Charles H. White
2140 St. Bernard Avenue
New Orleans, La. 70119
Counsel of Record for Respondents,
Mr. and Mrs. N. H. White

Arthur G. Thompson
1116 Pierre Avenue
Shreveport, La. 71101
Counsel of Record for Respondent,
Mrs. Dorothy Mae Giles

BENJAMIN C. KING
Counsel for Petitioners,
Missouri Pacific Railroad
Company and The Texas
and Pacific Railway
Company

(April ____, 1976)

APPENDICES

APPENDIX A

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process.

* * * (d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * * (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and

plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative of several different types may be demanded.

Rule 10. Form of Pleadings.

(a) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

LOUISIANA CODE OF CIVIL PROCEDURE
Article 1261. Domestic or foreign corporation.

Service of citation or other process on a domestic or foreign corporation is made by personal service on any one of its agents for service of process. * * *

LOUISIANA CIVIL CODE
Article 2103. Liability of debtors among themselves.

When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a

quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit as provided in Article 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.

Article 2203. Remission as to one codebtor in solido.

The remission or conventional discharge in favor of one of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter.

In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission.

Article 2315. Liability for acts causing damage; survival of action.

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

Article 3519. Abandonment or discontinuance of suit.

If the plaintiff in this case, after having made his demand, abandons, voluntarily dismisses, or fails to prosecute it at the trial, the interruption is considered as never having happened.

Article 3536. Other actions prescribed by one year.

The following actions are also prescribed by one year:

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses. * * *

LOUISIANA STATUTES ANNOTATED

R.S. 9:5801. Interruption of prescription by filing of suit, service of process.

All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process.

R.S. 13:3473. Secretary of state to provide list of agents for service of process on foreign corporation.

To facilitate service of process on foreign corporations, the secretary of state shall issue, and shall deliver to the several clerks of the district courts and the several sheriffs throughout the state during the month of August of each year, a printed certified list setting forth in alphabetical order the names of all foreign corporations which have appointed agents for the service of process in this state, and the names and addresses of all such agents. Each clerk of a district court, and each sheriff, shall note thereon the date of the receipt thereof, and shall keep the list on file for public inspection. For the purpose and to the extent of interrupting prescription, and until the first day of September of the next succeeding year, service upon a foreign corporation through a person designated on such list as an agent for the service of process thereon is valid service upon the foreign corporation, any change or revocation of authority by the corporation to the contrary notwithstanding.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
NO. 74-901

FREEMAN BROWN, ET UX

versus

TEXAS AND PACIFIC RAILROAD COMPANY,
ET AL, IN SOLIDO

AND

CIVIL ACTION
NO. 74-909

MR. AND MRS. N. H. WHITE and MRS. DOROTHY
MAE GILES

versus

TEXAS AND PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY and
CADDO PARISH POLICE JURY

FOR PLAINTIFFS BROWN:
MESSRS.
LEWIS WEINSTEIN
609 Texas Street
Shreveport, LA 71101

BOBBY D. SUTTON and
GLENN E. WALKER
BURNETT, HARRISON, SUTTON
AND WALKER
1400 Youree Drive
Shreveport, LA 71101

FOR PLAINTIFFS WHITE:
CHARLES H. WHITE
2140 St. Bernard Avenue
New Orleans, LA 70119

FOR PLAINTIFF GILES:
ARTHUR G. THOMPSON
1116 Pierre Avenue
Shreveport, LA 71101

FOR DEFENDANT RAILROADS:
BENJAMIN C. KING
600 Commercial National Bank
Building
Shreveport, LA 71101

TOM STAGG — DISTRICT JUDGE

MEMORANDUM RULING

In two related cases arising out of a collision between a train and an automobile, this Court is called upon to determine the merits of a number of pretrial motions.

On September 27, 1973 in Caddo Parish, Louisiana, a car driven by Henry C. Rodney and occupied by his wife, Mrs. Joan White Rodney, and three minor children, Pamela Brown, Herlisa Brown and Paula Brown, was struck by a train at the intersection of Woolworth Road and the Texas and Pacific Railroad tracks. Mr. and Mrs. Rodney and Pamela Brown died as a result of injuries received in the collision and the remaining two minor children suffered personal injuries of a serious nature.

The record in Civil Action No. 74-901 shows that the complaint was filed on September 25, 1974, only a few days before prescription would have accrued. The complaint in Civil Action No. 74-909 was filed on September 27, 1974, the last day of the one-year period following the happening of the accident. In neither case was any defendant served with the citation within one year from the date of the accident.

Plaintiffs in No. 74-901 are Freeman Brown and his wife, Carrie Brown, domiciliaries of Caddo Parish, Louisiana, who are suing individually and on behalf of their minor children, Pamela, Herlisa and Paula Brown. Plaintiffs in 74-909 are Mr. and Mrs. N. H.

White and Mrs. Dorothy Mae Giles, domiciliaries of the State of Louisiana. Mr. and Mrs. White are the surviving parents of Mrs. Joan White Rodney and Mr. White is the administrator of the Succession of Mrs. Joan White Rodney. Mrs. Giles is appearing in her capacity as Tutrix of the minor children of Henry C. Rodney, who are Bernice Lucille Rodney and Tricia Andrea Rodney.

Named as defendants in both suits are the Texas and Pacific Railroad Company and the Missouri and Pacific Railroad Company, corporations organized under the laws of the State of Delaware and doing business in the State of Louisiana. Also made a defendant in both suits is the Caddo Parish Police Jury, a non-profit organization domiciled in Caddo Parish, Louisiana.

Jurisdiction of this Court over these suits is allegedly based on diversity of citizenship, 28 U.S.C. §1332, as the amount in controversy in both cases exceeds the sum or value of $10,000, exclusive of interest and costs.

Soon after the filing of these suits, counsel for the railroads interposed a motion to dismiss for lack of jurisdiction over the subject matter as there was not complete diversity of citizenship between plaintiffs and defendants in either case, as required by *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806). A review of the parties to this litigation quickly reveals that defendant Caddo Parish Police Jury is domiciled in the same state as plaintiffs therefore complete diversity is lacking in both suits.

In an attempt to cure the jurisdictional defect, counsel in 74-901, pursuant to Rule 21 of the Federal Rules of Civil Procedure, sought leave of court to amend their petition in order to drop the Police Jury as a party defendant. Counsel for plaintiffs in 74-909 sought to cure the defect by dismissing its action against the Police Jury in accordance with Rule 41(a)(1), F.R.C.P.

During oral argument on these motions, which was held on February 21, 1975, counsel for the railroads objected strenuously to the dismissal of the action as to the Police Jury either by an amendment of the petition under Rule 21 or by a voluntary dismissal pursuant to Rule 41(a). Before ruling on the motions, this Court requested a supplemental brief from the defendants in support of their position. Thereafter, on March 14, 1975, counsel for defendants filed motions to dismiss for failure to state a claim upon which relief could be granted and for summary judgment on the ground that there is no genuine issue of material fact. Defendants' counsel also raised a plea of prescription and further pled that plaintiffs had released a solidary obligor without expressly reserving their rights against remaining solidary obligors, thereby releasing the remaining defendants.

All of these motions, save that concerning the release of a solidary obligor, are bound up with the question of whether jurisdiction of this Court can be maintained and perfected by a release of the Police Jury as a defendant and whether this release will operate retroactively to the time of the filing of the original complaint.

In a suit wherein the jurisdiction of the Federal District Court is based on diversity of citizenship, plaintiff must, before the statute of limitations has run, do whatever he would be required to do in a similar suit in State Court. *Ragan v. Merchants Transfer and Warehouse Company*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949). In the *Ragan* case, the Supreme Court held that where jurisdiction is based upon diversity of citizenship, a federal court cannot give an action longer life than it would have had in the State Court. The applicable state law on the subject is contained in LSA-R.S. 9:5801, which provides, in part:

> "* * * When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process. As amended Acts 1960, No. 31, §1."

Using this statutory provision as his springboard, counsel for the railroads argues that as the complaints were filed in an incompetent court initially and since none of the defendants were served with the citation within one year of the date of the accident, then there was no interruption of prescription and the action is now barred by the one-year statute of limitations contained in LSA-C.C. art. 3536.[1]

Plaintiffs in both cases contend that this Court has the authority to order the deletion of the Caddo Parish

1 LSA-C.C. art. 3536 provides:
"ART. 3536. Other actions prescribed by one year.
ART. 3536. The following actions are also prescribed by one year:
That * * * resulting from offenses or quasi offenses.
* * *."

Police Jury as a party defendant and that such deletion relates back to the time of the original filing. Thus, the plaintiffs contend that the complaint was initially filed in a court of competent jurisdiction within the meaning of LSA-R.S. 9:5801 and prescription was interrupted. For the reasons set forth below, this Court agrees with the position taken by plaintiffs and denies the motions to dismiss for lack of subject matter jurisdiction, for summary judgment and for failure to state a claim upon which relief can be granted. Also, this Court finds that the actions in 74-901 and 74-909 have not been lost by prescription nor by the release of a solidary obligor.

AMENDMENT OF COMPLAINT IN ORDER TO CURE A JURISDICTIONAL DEFECT

A federal district court has the power to preserve and perfect its diversity jurisdiction over a case by dropping a non-diverse party providing the non-diverse party is not an indispensable party whose presence in the action is required under Rule 19, F.R.C.P.[2] Wright & Miller, Federal Practice and Procedure, Civil §1685; 3 Moore's Federal Practice ¶ 15.09. Such is the settled law of the Fifth Circuit. See *Anderson v. Moorer*, 372 F.2d 747 (1967); *Travelers v. Brown*, 338 F.2d 229 (1964); and *Hunt Tool Co. v. Moore Inc.*, 212 F.2d 685 (1954). Indeed, in *Anderson*, the Court went so far as to hold that the District Judge exceeded his discretion when he refused to allow certain defendants to be dropped in order to perfect diversity jurisdiction. 372 F.2d 747, 750.

2 Defendant has not alleged nor does this Court find that the Caddo Parish Police Jury is an indispensable party. In the Court's opinion, complete relief can be afforded between plaintiffs and the railroads without prejudicing any of them or the Police Jury.

According to these authorities, for this Court to refuse plaintiffs in both cases the right to amend their petition in order to delete the nondiverse party would be an abuse of discretion. Therefore, the amendments will be allowed.

Now that it has been determined that the amendments should be allowed, the question arises as to which of the Federal Rules must be utilized in order to effect the amendment. As pointed out previously, plaintiff in 74-901 sought leave of court pursuant to Rule 21, while plaintiff in 74-909 sought to achieve the same result via Rule 41(a)(1). Neither of these rules expressly excludes application of the other and this Court finds that the use of either procedure is proper. *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250 (5th Cir. 1973). Furthermore, the weight of authority is to the effect that either rule may be used. Wright & Miller, Federal Practice and Procedure: Civil § 2362.

WILL THE AMENDMENT RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT?

Having determined that the original complaint may be amended by dropping a nondiverse party in order to cure a jurisdictional defect, and that such amendment can be effected by either Rule 21 or Rule 41 of the Federal Rules of Civil Procedure, the only remaining issue is whether such amendments relate back to the filing of the original complaint.

In the present case, the answer to this question is crucial. If the amendments do not relate back, then

according to the terms of LSA-R.S. 9:5801, the actions have prescribed as the complaints were not filed in a competent court and no defendant was served with the citation within the one-year prescriptive period. However, if the amendments do relate back then the filings would have been in a competent court thus prescription would be interrupted as of the date the complaints were filed.

In 3A Moore's Federal Practice ¶ 21.03[2], this language appears:

> "[2] - Where Joined Party Affects Subject Matter Jurisdiction or Statute of Limitations Has Run.
>
> "The issues are more complicated where the presence of the allegedly misjoined party will also defeat the subject matter jurisdiction of the court. Additionally, although the original action has been timely commenced, the statute of limitations may have run before the misjoined party can be dropped. As to both of these issues, i.e., subject matter jurisdiction and statute of limitations, there is a clear federal commitment to allow relation back of amendments dropping parties in order to uphold subject matter jurisdiction and to avoid statutes of limitations. The stated principle covers not only cases involving technically 'misjoined' parties, but also cases involving parties properly joined as a procedural matter, but whose presence will defeat the subject matter jurisdiction of the court.

* * * * *

> "Accordingly, it may be seen that where lack of diversity of citizenship as to some defendants exists, and such defendants are not indispensable parties, these defendants may be dropped and jurisdiction may thereby be established with retroactive effect. The original filing of the complaint serves to toll the running of the statute of limitations." Footnotes omitted.

In *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), the Court stated:

> "* * * When the suit was voluntarily dismissed, however, as to all of the defendants except the appellee, against whom a verdict had been rendered, the amendment of the pleadings related to the date of filing of the original suit and cured the defect in the district court's jurisdiction of the controversy between the remaining parties. Rule 15(c) and Rule 21, Federal Rules of Civil Procedure, 28 U.S.C.; 3 Moore's Federal Practice (2d ed.), Sections 15.09 and 15.15, pp. 836, et seq., and 850, et seq."

This Court finds that the amendments to the complaints in 74-901 and 74-909 relate back to the date of the filing of the original complaints, thereby interrupting prescription as of the date the complaints were filed.[3]

3 Although this finding is based on federal authorities, it is in line with the Louisiana law on the subject. See LSA-C.C.P. art. 1153; 43 Tul.L.Rev. 211, 231 (1969). Therefore, this Court, in compliance with *Ragan v. Merchants Transfer and Warehouse Company*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), has not given the action longer life than it would have been given by a Louisiana State Court.

RELEASE OF JOINT OBLIGOR

The final motion of defendant concerns the allegation that a release of the Caddo Parish Police Jury operates a release of the defendant railroads. Defense counsel apparently has misconstrued the effect of the amendments to the complaints. The dismissal in 74-909 is without prejudice to the rights of plaintiff to pursue their actions against the Police Jury in the future should they choose so to do. Likewise, the dismissal in 74-901 is without prejudice to plaintiffs' rights. The release contemplated by LSA-C.C. 2203 is a final dismissal which precludes further action by the plaintiff against the dismissed defendant.

For the foregoing reasons, the motions to dismiss advanced on behalf of defendants are denied. The motion to dismiss the complaint in 74-901 as to the Caddo Parish Police Jury is granted. Counsel in 74-909 will now proceed to perfect service of process as per the agreement reached between the Court and counsel at the February 21, 1975 motion hearing.

The Professional Law Corporation of Burnett, Harrison, Sutton & Walker will be allowed to enroll as counsel for complainants in 74-901 and Lewis Weinstein is hereby allowed to withdraw.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 31st day of March, 1975.

/s/ TOM STAGG
TOM STAGG
UNITED STATES DISTRICT
JUDGE

RULING

After this Court's Memorandum Ruling denying defendants' motion to dismiss in C.A. No. 74-901 and 74-909, counsel for defendants filed these motions for a rehearing or alternatively for a new trial. In his motions counsel complains of allegedly erroneous conclusions of law reached by the Court in denying the motions to dismiss. Feeling that oral argument on the present motions would be unproductive in light of the extensive memoranda filed by counsel, the Court will proceed to determine the motions on the strength of the existing record.

The primary consideration in the decision to grant or deny a rehearing is the strong possibility that the Court's original determination may have been incorrect. *Graci v. United States;* 301 F.Supp. 947 (D.C.La. 1969). Such a decision necessarily must be left to the sound discretion of the trial judge.

Having reviewed the Court's original ruling in light of the authorities relied on by counsel for the defendants, this Court cannot conclude that there is a strong possibility that the Memorandum Ruling was incorrect. Accordingly, the motions for rehearing or alternatively for a new trial in 74-901 and 74-909 are denied.

Although in the Court's mind there does not exist the strong possibility that the Memorandum Ruling was incorrect, the Court recognizes that its ruling does involve a controlling question of law as to which there is a substantial ground for difference of opinion.

Furthermore, an immediate appeal from this ruling may materially advance the ultimate termination of the litigation. Therefore, pursuant to Title 28 U.S.C. § 1292 (b), this Court will stay proceedings in these cases until such time as an appeal has been taken and disposed of concerning the Memorandum Ruling of March 31, 1975.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 6th day of May, 1975.

/s/ TOM STAGG
TOM STAGG
UNITED STATES DISTRICT
JUDGE

[FILED: MAY 7, 1975]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-8185

THE TEXAS & PACIFIC RAILWAY COMPANY and
MISSOURI PACIFIC RAILROAD COMPANY,
Petitioners,

versus

FREEMAN BROWN AND CARRIE BROWN,
Respondents.

TEXAS & PACIFIC RAILWAY COMPANY and MISSOURI PACIFIC RAILROAD COMPANY,
Petitioners,

versus

MR. & MRS. N. H. WHITE and
MRS. DOROTHY MAE GILES,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

---

Before COLEMAN, AINSWORTH, and SIMPSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Louisiana entered on May 6, 1975, is GRANTED.

[FILED: JUN. 13, 1975]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3438
Summary Calendar*

MR. AND MRS. N. H. WHITE, ET AL.,
Plaintiffs-Appellees,

versus

MISSOURI PACIFIC RAILROAD COMPANY,
ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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* Rule 18, 5th Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

(February 6, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

A careful review of the briefs and relevant authorities in this case leads us to the conclusion that the decision of the district court should be affirmed for the reasons set forth in Judge Tom Stagg's Memorandum Ruling. *White v. Missouri Pacific Railroad Co.*, 392 F. Supp. 1120 (W.D. La. 1975).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-3438
Summary Calendar

D. C. Docket No. CA-74-909

MR. & MRS. N. H. WHITE, ET AL.,
Plaintiffs-Appellees,

versus

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 6, 1976

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

March 11, 1976

TO ALL COUNSEL OF RECORD

No. 75-3438 - Mr. & Mrs. N. H. White, ET AL. v. Missouri Pacific Railroad Company, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no

member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg

cc: Mr. Benjamin C. King
Mr. Charles H. White

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

March 26, 1976

Mr. Benjamin C. King
Attorney at Law
600 Commercial National Bank Bldg.
Shreveport, LA 71101

No. 75-3438 - Mr. & Mrs. N. H. White, Et Al v.
Missouri Pacific Railroad Co.,
Et Al

MANDATE STAYED TO AND INCLUDING
April 25, 1976

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ MARY BETH BREAUX
Deputy Clerk

enc.

cc: Mr. Charles H. White
Mr. Arthur G. Thompson